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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., ET AL., *Appellants*

EMMA SHANNON AND RICHARD J. SHANNON, d/b/a

E. AND R. SHANNON, *Appellees*

On Appeal from the United States District Court for the  
Western District of Texas, San Antonio Division

APPELLANTS' REPLY BRIEF

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**APPELLANTS' REPLY BRIEF**

**APPELLEES' TRUCKLOAD SUGAR TRANSPORTATION  
IS FOR-HIRE CARRIAGE UNDER THE PRIMARY  
BUSINESS TEST OF THE LENOIR CHAIR-BROOKS  
CASE.**

Appellees rest their case on the proposition that their truckload sugar transportation qualifies as a lawful private carrier operation under the primary business test of the *Lenoir Chair* (or *Brooks*) case<sup>1</sup> (appellees'

<sup>1</sup>*Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65 (1949); affirmed *Brooks Transp. Co. v. United States*, 93 F. Supp. 517 (1950); affirmed 340 U.S. 925 (1951). For a discussion of these cases see our first brief pp. 11, 24-26. The *Lenoir Chair* test, 51 M.C.C. p. 75, is:

"If . . . the primary business . . . is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed."

brief pp. 13-24). Then they argue that the 1958 amendment to section 203(c) of the Interstate Commerce Act added nothing to existing law (id. pp. 24-31). Our first brief has demonstrated, we submit, that the 1958 amendment, far from being a useless exercise, was directed specifically against buy-sell backhaul practices of the sort here engaged in by appellees, and our argument to that end need not be repeated.

We will here review briefly the undisputed facts which establish, contrary to appellees' contention, that under the *Lenoir Chair-Brooks* principle appellees are engaged unlawfully in transportation for hire. It will be recalled that the Commission commenced this proceeding on that theory in 1956 (R. 55) before it had the aid of the 1958 amendment to section 203(c). And apropos this point the Commission said (R. 26; 81 M.C.C. pp. 343-344):

"It is our view that the principal question here, whether considered prior to or subsequent to the amendment of section 203(c), inasmuch as \* \* \* the Shannons are [not] engaged in transportation as a primary business, is whether the sugar transportation operations of \* \* \* the Shannons are in bona fide furtherance of the primary business of the \* \* \* respondents, on the one hand, or, on the other, are conducted as related or secondary enterprises with the purpose of profiting from the sugar transportation performed."

And the Commission concluded (R. 30; 81 M.C.C. p. 347):

"Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, con-

stitutes for-hire carriage for which operating authority from this Commission is required."

The undisputed evidence fully supports the Commission's conclusion. Appellees are engaged in two distinct commercial enterprises. One of these is the business conducted at the San Antonio warehouse where all commodities dealt in *except truckload sugar* are stored, where some are processed, and from which deliveries are made to customers. The other business is the long distance transportation for hire of truckload sugar that by-passes the warehouse. Various features of the two businesses make this clear.

**A. The smooth and dependable coordination of the truckload movement between appellees and the truckload purchasers.**

Exhibit 1 (R. 117-118, admitted R. 62) is set forth on the following pages. We have added column 13 to the extreme right of the Exhibit to show the number of 100-pound bags of sugar in each truckload, a figure computed by dividing column 11 by column 12. Column numbers have also been added for convenient reference. Exhibit 1 was prepared by the Commission's District Supervisor at San Antonio from appellees' records, and its admission was stipulated in lieu of introducing the records under subpoena, exception being taken only to its relevance (R. 60-62).

Exhibit 1 lists appellees' principal purchasers of sugar, although sales are not limited to them (R. 70). Exhibit 1 is based on examination of appellees' documents for a three months period preceding the examination and is meant to be a representative picture of

<sup>2</sup> It is to be noted that section 203(c) before the 1958 amendment forbade, with exceptions not material here, all for-hire transportation not specifically authorized by the Commission. The amendment retained all of the pre-1958 language.



the sugar transportation (R. 65). The "Dray Receipt" (cols 4, 5) shows the date of loading apples' truck at the refinery (R. 66).

BEFORE THE INTERSTATE COMMERCE COMMISSION  
EXHIBIT No. 1

(From pages 117-118 of Record)

MC-C-2055, Emma Shannon and Richard J. Shannon,  
doing business as E. and R. Shannon, and J. T. Wilcox,  
doing business as Wilcox Brokerage Company

PURCHASES OF SUGAR FROM J. ARON & Co.,  
SUPREME, LOUISIANA

Shipment Date	Invoice No.	Date	Dray No.	Receipt Date	Cost F.O.B. Supreme, La.
(1)	(2)	(3)	(4)	(5)	(6)
5-15-56	1683	5-14	3893	5-15	\$2610.72
5-27-56	2266	5-26	4267	5-27	3068.62
6-5-56	2704	6-4	4531	6-5	3068.63
6-6-56	2751	6-6	4589	6-6	2895.17
6-16-56	3215	6-16	4887	6-16	2521.54
6-21-56	3440	6-21	5034	6-21	2928.24
7-20-56	4954	7-20	6144	7-20	3068.63
7-29-56	5372	7-28	6389	7-29	2608.76
7-31-56	5440	7-31	6437	7-31	3057.60
8-2-56	5549	8-2	6532	8-2	2602.88
8-6-56	5663	8-5	6667	8-6	2618.56
8-15-56	6100	8-15	7011	8-15	2536.73
8-23-56	6349	8-22	7228	8-23	3050.25
8-30-56	6665	8-30	7459	8-30	3058.83
8-29-56	6606	8-29	7412	8-29	2536.73

## SALES OF SUGAR BY E. AND R. SHANNON, SAN ANTONIO, TEXAS

Sales Slip No.	Date	Consignee San Antonio	Resale Price Delivered San Antonio	Differ- ence	Net Profit in cents per 100 lbs.	Number of 100- pound bags in load: col. 1) col. 12
(7)	(8)	(9)	(10)	(11)	(12)	(13)
1262	5-16	Lawler	\$2736.16	\$ 125.44	39.2	320
1267	5-29	Judson	3236.45	167.83	44.7	375
		Knowlton				
1271	6-7	Knowlton	3252.37	183.74	49	375
1273	6-8	Lawler	3034.32	139.15	39.2	355
1277	6-17	Barq's	2658.25	136.71	44	311
1283	6-23	Lawler	3069.36	141.12	39.2	360
1296	7-21	Lawler	3242.75	173.74	46.3	375
1297		Knowlton				
1298	7-30	Lawler	2734.20	125.44	39.2	320
1299	8-2	Lawler	3119.00	143.08	39.2	365
1300	8-4	Barq's	2744.00	141.12	44	321
1301	8-7	Knowlton	2775.36	156.80	48.1	326
1306	8-17	Knowlton	2673.44	136.71	44	311
	8-24	Barq's	3197.25	147.25	39.2	376
1313	8-31	Lawler	3182.55	123.72	33	375
1312	8-31	Guerra	2620.27	83.54	27	309
(Laredo)						
\$2125.39					35.74	
(Total)					(Aver- age)	

The "Sales Slip" (cols. 7, 8) is a document executed in appellees' office in San Antonio showing the quantity of sugar and the price at which it was delivered to the purchaser (R. 66). The purchasers are: Lawler, a wholesale grocery company; Judson Candy Company; Knowlton, a dairy; Barq's, a bottling company; all in San Antonio; and Guerra, a wholesale grocer in Laredo, Texas (R. 67).

A frequent recurrence of the same purchasers stands out, as follows:

Lawler	7 loads to San Antonio
Judson	1 load to San Antonio
Knowlton	5 loads to San Antonio
Barq's	3 loads to San Antonio
Guerra	1 load to Laredo

The rapid time sequence between the truck loading date at the refinery (col. 5) and the sales slip date at San Antonio (col. 8) is notable; one day on 7 loads and 2 days on 8 loads. This is conclusive evidence of an assurance on the part of appellees that they can in routine fashion load a truck at the refinery with sugar worth \$2500 to \$3000 and thereafter sell and deliver it directly to the purchaser at San Antonio 525 miles away one or two days later at a profit. This accomplishment is particularly noteworthy in view of appellees' evidence about the economic risks of the operation: that the wholesale price of sugar fluctuates quickly and drastically (R. 73, 104), that the quality of sugar is peculiarly susceptible to quick deterioration that would affect its value (R. 72, 104), and that unloading a truckload of sugar into a storage warehouse instead of at a consumer's place of business entails profit-destroying costs (R. 68, 77).<sup>\*</sup> That appellees in



7 3  
the transportation of sugar have been able to avoid these normal dealer hazards is shown by Exhibit 1.

The foregoing fairly suggests that the degree of coordination in the sugar movement between appellees and the purchaser-consumer is much like the ordinary carrier-shipper relationship. The movement resembles a highly dependable motor contract carrier service far more closely than it does a sugar jobbing business with all the attendant risks and uncertainties described by appellees. All of these facts were taken into account by the Commission as bases of decision (R. 20, 23, 24) and are to be kept in mind in considering further indicia of for-hire transportation.

**B. Appellees' sugar transportation originates in a search for employment of surplus transportation facilities.**

Appellees claim to be jobbers of truckload sugar, but it is clear that they become sugar jobbers only when they have surplus transportation facilities to sell (R. 66-68, 112-113). In the ordinary course of business a jobber or shipper has goods to move and therefore looks for transportation. Appellees reverse this process; they have surplus transportation on hand and they seek a load of sugar in order to profit from the haul, just as does any carrier for hire (R. 66-68, 112-113). Appellees engage in the truckload handling of sugar only when a dominant *transportation* situation makes it economically necessary or desirable for them to do so. That transportation situation is a large empty truck in southern Louisiana that needs a backhaul to

\* See for example *Interstate Commerce Com. v. J-T Transport Co.*, 368 U.S. 81, 84-85 (1961).

San Antonio, some 500 miles away. It is the urge or need to engage in compensated transportation that brings the empty truck to the sugar refinery (R. 66-68, 112-113). Thus it is available transportation capacity that creates the sugar handling; transportation is the primary business. On this the Commission said (R. 29):

“\* \* \* the purpose of their sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction.”

**C. Marked difference between appellees' truckload sugar haul and their other business.**

The truckload sugar transportation from the refinery to the purchaser is a business entirely different in its physical characteristics from the enterprise carried on in connection with appellees' warehouse and feed mill. In the truckload sugar transportation it is necessary to avoid intermediate unloading at a warehouse because of the extra costs thus entailed (R. 68, 77, 110) and the possibilities of damage and deterioration (R. 72). For these reasons appellees' warehouse at San Antonio is not intended to be used, and is not used, for the storage of sugar involved in the truckload transportation operation; on an occasion where, due to a misunderstanding, a truckload of sugar was refused at San Antonio, it was necessary to store the sugar temporarily in a public warehouse because there was no room for it in appellees' warehouse (R. 77, 81-82). There could have been hardly more than 100 bags in appellees' warehouse at the time since the total inventory in both warehouses after putting the refused load in the public warehouse was only “something

over" 400 bags (R. 81-82). In this connection it is to be noted that the difference between the price paid for sugar at the refinery and the price received in San Antonio is not large enough to make the transportation profitable if public warehouse charges have to be paid (R. 77).

In contrast to the truckload sugar transportation, the sugar dealing carried on in connection with the other warehouse business consists of the sale and delivery in 1 to 25 bag lots of sugar regularly stored in the warehouse (R. 68). This sort of transaction bears no resemblance to the truckload transportation of more than 300 bags in a lot from the refinery directly to the consumer.

The Commission took into account these differences between appellees' two distinct enterprises in determining that the truckload sugar hauling is transportation for hire (R. 29-30), finding that because of its different characteristics the truckload sugar transportation was "a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage." (R. 30).

Appellees refer (brief pp. 16, 81) to their maintenance of an inventory of 50,000 pounds of sugar. That statement needs clarification. It is entirely plain from the record that on the only identified occasion when appellees claimed that large an inventory there was included in the inventory an entire truckload that had been stored in a public warehouse as above explained (R. 77, 81-82, 93-94).

D. The profit derived by appellees indicates that it is a charge for transportation.

Appellees presented evidence that at a time contemporaneous with the transactions here involved "the reasonable, normal return per hundred pounds of a sugar dealer here in San Antonio" is anywhere from 25 to 35 cents on a hundred pounds" FOB San Antonio (R. 103). On 14 representative shipments of sugar the difference between the price paid by appellees at Supreme and the price received by them delivered at San Antonio averaged 42 cents per 100 pounds, the lowest and highest figures being 33 and 49 cents, with all figures except the lowest being 39.2 cents or more (Ex. 1; R. 60-61, 117-118; computed by omitting the 27 cents figure in the last line of the last column which was a shipment to Laredo, Texas). Railroad freight rates per 100 pounds on sugar from Supreme to San Antonio are, carload 69 cents, less than carload \$1.38, and corresponding motor common carrier rates are, truckload \$1.09, less than truckload \$1.70 (Ex. 2, R. 62, 63, 78, 119-122; Exh. 3, R. 63, 64, 78, 122-126). It appears further from appellees' evidence that anyone who wants to buy sugar at San Antonio "in 25 bag lots or 50 bag lots or whatever amount they want" can obtain it "at the carload price delivered in San Antonio" less two per cent; and "that is the figure that a sugar dealer has to beat or to match in order to sell sugar" (R. 104).

That evidence fairly warrants a comparison (1) of appellees' average "profit" of 42 cents per 100 pounds (maximum 49 cents generally 39.2 cents or above) with (2) the carload freight rate of 69 cents, and with (3) the average dealer return of 25 to 35 cents. Since appellees' "profit" falls midway between items (2) and

(3) and is substantially in excess of normal dealer return, it is a fair conclusion that appellees' "profit" is a bargain transportation charge designed to undercut the tariff rates of authorized rail and motor carriers. As the Commission said (R. 30):

"... we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such."

**THE DISTRICT COURT FAILED TO CONSIDER THE DIFFERENCES BETWEEN APPELLEES' TWO ENTERPRISES.**

The District Court (R. 165-167) not only failed to mention or consider section 203(c), but it also did not refer to or take into account the primary business test of the *Lenoir Chair-Brooks* case (note 1 *supra*). The Court took no notice whatsoever of the differences between appellees' mercantile business transacted through the warehouse and the long-haul truckload transportation of sugar directly from the refinery to the consumer. For example, a reading of the Court's opinion by one unacquainted with the record would leave the impression that all of the sugar is carried to the warehouse and stored there awaiting sales. Likewise there is no mention of the fact that truckload sugar is hauled from the refinery to consumers *only* when an empty truck that has carried an outbound load is seeking a return load and is thus entering the transportation business in order to avoid the cost of an empty back haul. These and the other indicia of for-hire transportation set forth above and reviewed in the Commission's Report (R. 17-31) received no consideration in the Court's opinion (R. 165-167).



### APPELLEES HAVE NO "TECHNICAL DEFENSE"

Appellees allege that they have never been charged with a violation of section 203(c) and that they have therefore a "technical defense" against its application to them in this proceeding. There is no merit in this claim. The amendment of (August 12) 1958, 72 Stat. 568, 574, was enacted between the time the Examiner's proposed report was filed on August 29, 1957 (R. 9), and the date the report of Division 1 of the Commission was served, August 11, 1959 (R. 17), and therefore applies to appellees' operations here involved. *Ziffirin v. United States*, 318 U.S. 73, 78 (1943).

### CONCLUSION

The decision of the District Court should be reversed with directions to reinstate the Commission's report.

Respectfully submitted,

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Dated: April 10, 1964

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## APPENDIX A

The following intervening defendants in the Court below do hereby participate as appellants in this reply Brief:

- (1) Red Ball Motor Freight, Inc.
- (2) Brown Express, Inc.
- (3) Texas-Arizona Motor Freight, Inc.
- (4) Central Freight Lines, Inc.
- (5) The Atchison, Topeka and Santa Fe Railway Company
- (6) Chicago and North Western Railway Company
- (7) Chicago, Burlington & Quincy Railway Company
- (8) Chicago Great Western Railway Company
- (9) Chicago, Milwaukee, St. Paul and Pacific Railroad Company
- (10) Chicago, Rock Island and Pacific Railroad Company
- (11) Great Northern Railway Company
- (12) Illinois Central Railroad Company
- (13) The Kansas City Southern Railway Company
- (14) St. Louis-San Francisco Railway Company
- (15) Soo Line Railroad Company
- (16) Union Pacific Railroad Company
- (17) Wabash Railroad Company
- (18) The Western Pacific Railroad Company
- (19) Texas Tank Truck Carriers Association, Inc.
- (20) Regular Common Carrier Conference of American Trucking Associations, Inc.